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No. 560

In the Supreme Court of the United States

OCTOBER TERM, 1931

CONTINENTAL TIE AND LUMBER COMPANY,
PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES

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MEMORANDUM FOR THE UNITED STATES

We do not oppose the instant petition.

OPINION BELOW

The opinion of the Court of Claims (R. 15) is reported in 52 F. (2d) 1045.

JURISDICTION

The judgment sought to be reviewed was entered on October 20, 1931. (R. 21.) The petition for certiorari was filed on December 8, 1931. (R. 22.) The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925.

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QUESTIONS PRESENTED

1. Whether a sum paid the petitioner as reimbursement of its railway operating deficit for the period during which other railroads were under Federal control, pursuant to a certificate of the Interstate Commerce Commission issued under Section 204 of the Transportation Act of 1920, was taxable income.

2. Whether, if it was such income, it was taxable, as the Commissioner ruled, in 1920 when the Act was passed, rather than in 1923 when the certificate was issued.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix to petitioner's brief, pp. 11–12.

STATEMENT

The petitioner filed a consolidated tax return for 1920 on the accrual basis, on behalf of itself and the Cimarron & Northwestern Railway Company, and during 1921 paid the tax so reported. (R. 12.) In considering and allowing a claim for refu d of part of this tax, the Commissioner added to the petitioner's 1920 income $27,228.35, thus reducing the refund paid. (R. 12.)

The amount of the tax ($200) on $2,000 of the increase was decided by the Court of Claims to be due the petitioner as a refund, and the Government does not question that decision.

The rest of the increase made by the Commissioner in 1920 income, $25,228.35, was attributable to an amount paid the petitioner in October, 1923, pursuant to a certificate of the Interstate Commerce Commission acting under Section 204 of the Transportation Act of 1920, which provided for the reimbursement of certain carriers for railway operating deficits during the period in which other railroads were under Federal control. (R. 12, 13.) No question is raised as to the correctness of the certificate. The petitioner's claim for refund of the tax was duly filed and rejected by the Commissioner. The Court of Claims allowed no recovery on account on this item.

DISCUSSION

The instant case is apparently the first case in which the precise point here involved has been decided. The other cases in which it is presented are not numerous nor do they involve large amounts. But the question is similar to that which is presented in cases of railroads which, under Section 209 of the Transportation Act of 1920, received payments from the Government for the "guaranty period" of six months beginning March 1, 1920. A petition for certiorari to the Court of Claims in such a case has recently been filed. *Texas & Pacific Railway Co.* v. *United States,* No. 634. The only decisions as to the taxability of funds paid

under Section 209 are that of the Court of Claims in that case and those of the Board of Tax Appeals in *Gulf, Mobile & Northern Railroad Co.* v. *Commissioner,* 22 B. T. A. 233, and other cases, all of which held such payments taxable. The Government will not oppose the petition in the *Texas & Pacific Railway Co.* case, as the question there presented seems to be one of importance. There are now pending in the Board of Tax Appeals sixteen cases involving that question, in addition to two cases in the United States District Court. The amounts involved in these cases aggregate more than $11,000,000, and it seems highly probable that appeals in these cases will be taken to the Circuit Courts of Appeals of nearly all of the circuits.

The taxpayers in the instant case and in the cases arising under Section 209 assert that the decisions of the Court of Claims are in conflict with that of this Court in *Edwards* v. *Cuba Railroad,* 268 U. S. 628. We do not agree with this assertion, and believe that both cases were correctly decided by the Court of Claims. Nevertheless, there seems to be no controlling decision by this Court. See, however, *Williams* v. *Heard,* 140 U. S. 529.

In this situation we believe that much litigation and expense will be avoided if questions arising in regard to payments made under both Sections 204 and 209 are now settled by this Court.

For these reasons, we do not oppose the instant petition.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.
CHARLES B. RUGG,
Assistant Attorney General.
CLAUDE R. BRANCH,
Special Assistant to the Attorney General.
LISLE A. SMITH,
BRADLEY B. GILMAN,
Attorneys.

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